UNITED STATES COURT OF MILITARY COMMISION REVIEW

BEFORE THE COURT
POSCH, LEWIS, AND SCHENCK, JUDGES

IN RE ALI ABDUL-AZIZ ALI
ALSO KNOWN AS AMMAR AL BALUCHI[1]
AND
WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH

CMCR 21-002

September 7, 2021

Colonel Douglas K. Watkins, JA, U.S. Army, military commission judge.

James G. Connell III, *Alka Pradhan*, *Benjamin R. Farley*, and *Leah A. O'Brien*, on briefs and/or motions for Petitioner Ali Abdul-Aziz Ali.

Cheryl T. Bormann, *Edwin A. Perry*, *William R. Montross Jr.*, *Major Jay S. Peer*, U.S. Air Force, and *Anisha P. Gupta*, on briefs and/or motions for Petitioner Walid Muhammad Salih Mubarak Bin 'Attash.

Brigadier General Mark S. Martins, U.S. Army, *Michael J. O'Sullivan*, *Haridimos V. Thravalos*, and *Major Jackson T. Hall,* U.S. Air Force, on briefs and/or motions for respondent.

PUBLISHED OPINION OF THE COURT

Opinion for the court filed by SCHENCK, JUDGE, with whom POSCH and LEWIS, JUDGES, concur.

Opinion for the court

SCHENCK, JUDGE:

Petitioners Ali Abdul-Aziz Ali, also known as Ammar al Baluchi, and Walid Muhammad Salih Mubarak Bin 'Attash are two of five accused being tried

[1] In documents issued by this court, Petitioner Ali Abdul-Aziz's name sometimes is reversed with his alias, as *Ammar al Baluchi also known as Ali Abdul Aziz Ali* and 'Attash is sometimes spelled 'Atash.

by military commission at Guantanamo Bay, Cuba. The other three accused are Khalid Shaikh Mohammad, Ramzi Bin al Shibh, and Mustafa Ahmed Adam al Hawsawi, and they have not joined in the petition for writ of mandamus before us. All five accused face capital charges for multiple violations of the law of war, pursuant to the Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t, for their alleged roles in the planning and execution of the attacks on September 11, 2001.

In requesting a writ of mandamus, petitioners urge this court to (i) "invalidate" the November 16, 2020, memorandum of Deputy Secretary of Defense (Deputy SECDEF) David L. Norquist pertaining to the qualifications for detailing judges to military commissions; (ii) vacate the "judicial acts" of Chief Trial Judge (CTJ) Douglas K. Watkins after he re-detailed himself to petitioners' case on December 14, 2020; (iii) disqualify from further participation in their case any person who helped generate Deputy SECDEF Norquist's November 16, 2020, memorandum; and (iv) "require an untainted [CTJ] to detail an untainted trial judge" to petitioners' case. Pet'rs' Br. 5, 18 (June 25, 2021). Respondent opposes petitioners' remedial requests.

We agree with respondent that the extraordinary remedy of mandamus is not warranted in this case, except to vacate the decisions of Judge Matthew N. McCall. The decisions issued by Judge McCall while he had less than two years of judicial experience are vacated because he was not qualified to sit as petitioners' trial judge in their military commission. Judge McCall lacked the requisite level of judicial experience. Deputy SECDEF Norquist did not act improperly, and he did not unlawfully influence CTJ Watkins' decisions or petitioners' trial judge.

I. APPELLATE BACKGROUND

Petitioners, their co-accused, or other interested parties, have filed ten petitions for writs of mandamus or writs of mandamus and prohibition with this court over the previous thirteen years: (1) *Ali v. United States*, No. 21-002 (CMCR June 25, 2021) (case at bar); (2) *Ali v. United States*, 398 F. Supp. 3d 1200, 1212, 1232 (CMCR 2019) (granting mandamus petition for vacatur of closure order and remanding for determination of need to close hearing for "all testimony"); (3) *Mohammad v. United States*, 393 F. Supp. 3d 1101, 1103, 1109 (CMCR 2019) (denying mandamus petition regarding sufficiency of military judge's inquiry into defense counsel's possible conflicts of interest); (4) *United States v. Mohammad*, 391 F. Supp. 3d 1066, 1068 & n.1, 1071 (CMCR 2019) (denying mandamus petitions filed in United States Court of Military Commission Review (CMCR) Case Nos. 18-003, 18-004, and 19-002 to recuse all CMCR judges because of Department of Defense Standards of Conduct ethics opinion); (5) *Hawsawi v. United States*, 389 F. Supp. 3d 1001, 1003, 1009, 1014 (CMCR 2019) (denying two mandamus petitions for recusal of military commission Judge Keith A. Parrella for alleged actual or apparent bias, or both),

mandamus denied, *In re Hawsawi*, 955 F.3d 152, 154, 156, 162 (D.C. Cir. 2020);[2] (6) *al Baluchi v. United States*, No. 18-003, slip op. at 1, 15 (CMCR June 18, 2019) (order denying mandamus petition for stay of black site decommissioning), *mandamus denied*, *In re Baluchi*, 952 F.3d 363, 372 (D.C. Cir. 2020); (7) *Al Baluchi v. United States*, No. 18-001 (CMCR Feb. 7, 2019) (order denying as moot mandamus petition to require acceptance of documents by military commission); (8) *ACLU v. United States*, No. 13-003, slip op. at 1–2 (CMCR Mar. 27, 2013) (per curiam) (order denying mandamus petition for access to commission proceedings under public's First Amendment right); (9) *Miami Herald v. United States*, No. 13-002, slip op. at 1–2 (CMCR Mar. 27, 2013) (per curiam) (order denying mandamus petition for access to commission proceedings and sealed classified documents); (10) *Mohammad v. United States*, No. 08-002 (CMCR June 3, 2008) (order denying mandamus petition to bar arraignment).

Respondent filed one interlocutory appeal, and this court reversed the military commission judge's decision to dismiss two charges. *United States v. Mohammad*, 280 F. Supp. 3d 1305, 1330 (CMCR 2017), *vacated*, *In re Mohammad*, 866 F.3d 473, 477 (D.C. Cir. 2017) (per curiam). During that litigation, petitioner unsuccessfully moved to disqualify military CMCR judges for violation of 10 U.S.C. § 973(b), the Constitution's Commander-in-Chief Clause, and bias. *See United States v. Mohammad*, No. 17-002, slip op. at 10 (CMCR June 21, 2017), *mandamus denied*, *In re Mohammad*, No. 17-1179, 2018 U.S. App. LEXIS 29671, at *2 (D.C. Cir. Oct. 19, 2018) (per curiam) (unpublished order). A new panel of this court reinstated the two charges. *United States v. Mohammad*, 398 F. Supp. 3d 1233, 1258 (CMCR 2019).[3]

[2] In the United States Court of Military Commission Review (CMCR) *Hawsawi* decision, Al-Hawsawi filed a mandamus petition, and Ali's (Al-Baluchi's) request to join was granted. *Hawsawi v. United States*, 389 F. Supp. 3d 1001, 1004 (CMCR 2019). Khalid Shaihk Mohammad filed a separate mandamus petition, CMCR Case No. 19-001. *Id.* Both petitions sought recusal of military commission Judge Keith A. Parrella for actual or apparent bias, or both. *Id.* In denying relief, the CMCR considered "both [petitions] individually and in the aggregate." *Id.* at 1014. Before the United States Court of Appeals for the District of Columbia Circuit, Al-Hawsawi filed a petition for writ of mandamus and prohibition, D.C. Cir. Case No. 19-1100, which Khalid Shaihk Mohammad joined. *In re Hawsawi*, 955 F.3d 152, 156 (D.C. Cir. 2020). Bin 'Attash "separately filed a mandamus petition," D.C. Cir. Case No. 19-1117. *Id.* The two petitions sought the same relief, vacatur of "all orders" by Judge Parralla for judicial impartiality. *Id.* at 154. The D.C. Circuit Court consolidated and denied both petitions. *Id.* at 154, 162.

[3] Interlocutory litigation in *United States v. Mohammad* is ongoing in the United States District Court. *See, e.g., Al-Baluchi v. Esper*, 392 F. Supp. 3d 46, 68 (D.D.C. 2019) (denying Petitioner Ali's motion to enjoin his military commission and staying habeas proceedings before district court pending completion of military commission trial and appeal).

II. FACTS

On October 16, 2020, CTJ Watkins detailed Judge McCall as the military judge in petitioners' case. App. 585.[4] Judge McCall was assigned as a trial judge for general courts-martial in July 2019. App. 139–40. The parties agree that Judge McCall did not possess the minimum two years of trial experience specified in Regulation for Trial by Military Commission (RTMC), ¶ 6-3.d (2011 ed.), as a qualification requirement. Resp't Br. 4 (July 19, 2021). On October 20, 2020, Petitioner Ali moved for abatement of the military commission "until a judge qualified under [RTMC] 6-3 is available." App. 169.

On October 26, 2020, the CTJ wrote the SECDEF urging him to clarify that the CTJ's authority at RTMC ¶ 1-3.b "inherently" includes waiver authority of the two-year experience requirement in RTMC ¶ 6-3.d. App. 126.[5] The CTJ gave the following reasons for his request:

> A recent notice in a pending case raised an ambiguity concerning the Chief Trial Judge's authority under R.T.M.C. 1-3.b. to waive the regulatory 2-year military judge experience requirement of R.T.M.C. 6-3.d. The ambiguity stems from a lack of specificity in the R.T.M.C. and not a conflict with any provision in the Military Commissions Act of 2009 or the Rules for Military Commissions.
>
> Inherent in the authority to supervise and administer the Military Commissions Trial Judiciary must be the authority to waive the 2-year experience requirement when a military judge is otherwise qualified and certified under the statute. Reading the regulation otherwise would frustrate the delegated authority of the Chief Trial Judge, and undermine the independence of the trial judiciary

[4] All citations in this opinion (and order) to "App." are citations to petitioners' appendix filed on June 25, 2021, in connection with their petition for writ of mandamus.

[5] The Military Commission Chief Prosecutor reported to his supervisor, the Deputy General Counsel (Legal Counsel) (DGCLC), the following: (i) the prosecution's Notice of its position at AE 001L/AE 806 (GOV) that Judge Matthew N. McCall apparently was not qualified to be a military commission judge under Regulation for Trial by Military Commission (RTMC) ¶ 6-3.d, and (ii) that the prosecution thus was considering whether to file a motion to recuse Judge McCall. App. 140–41, 182. The DGCLC provided to the Chief Prosecutor a memorandum dated November 16, 2020, issued by the Deputy Secretary of Defense (Deputy SECDEF) and addressed to the Chief Trial Judge (CTJ). App. 141–42. The only involvement of the Chief Prosecutor, or any member of the prosecution, in the Deputy SECDEF's November 16 memorandum was to report to the DGCLC the prosecution's Notice of Position on Judge McCall's detail, including noncompliance with RTMC ¶ 6-3.d. *See* App. 140–42. The prosecution declined to release documents pertaining to communications between the DGCLC and the Office of the SECDEF concerning Judge McCall's detailing as petitioners' military commission judge. App. 503. There was no evidence presented to this court about the nature of, or extent to which, the DGCLC participated, if at all, in the Deputy SECDEF's decision to issue his November 16, 2020, memorandum.

> by potentially placing the Secretary of Defense, or his designee, in an active role in the nomination of judges into the pool of military commissions judges and the detailing of judges to Military Commission cases.
>
> To resolve the ambiguity in the R.T.M.C., and solidify the independence of the Military Commission Trial Judiciary, the Secretary should clarify that the Chief Judge's authority under R.T.M.C. 1-3.b. includes waiver authority of the 2-year experience requirement in R.T.M.C. 6-3.d.

App. 125–26.

Department of Defense (DoD) General Counsel Paul C. Ney Jr. recommended denial of the CTJ's request. App. 133. On November 16, 2020, the Deputy SECDEF[6] responded to the CTJ's request as follows:

> Upon review of the authorities, waiver of the RTMC requirements does not rest with you or members of the trial judiciary. DoD declines to issue the clarification you seek.
>
> Further, the two-year experience requirement is a reasonable and necessary requirement to best protect the interests of the accused and the Government in administering military commissions.

App. 164. The Deputy SECDEF did not mention Judge McCall, direct the CTJ to remove Judge McCall, or designate a replacement for Judge McCall. *See id.* On December 8, 2020, respondent filed a motion with the military commission asking that Judge McCall recuse himself because he "lacks two years of judicial experience, a requirement of R.T.M.C. 6-3.d,"[7] and his failure to recuse "would create legal uncertainty for the remainder of the trial and any subsequent appellate litigation." App. 136–37.

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[6] The Deputy SECDEF has authority to act on behalf of the SECDEF. *See* 10 U.S.C. §§ 113(d), 132(b)–(c); Dep't of Def. Dir. 5105.02, Deputy Secretary of Defense (Aug. 2019), https://directives.whs.mil/cancellations/510502_26%20Aug%202019_cancelled.pdf (describing Deputy SECDEF Norquist's delegated power and authority).

[7] Judge McCall met the qualification requirements in Rule for Military Commissions (R.M.C.) 502(c)(1) (2019), which states:

> (1) *Qualifications*. A military judge shall be a commissioned officer of the armed forces, serving on active duty, who is a member of the bar of a Federal court or a member of the bar of the highest court of a State or the District of Columbia. The military judge shall be certified to be qualified for duty under 10 U.S.C. § 826 (Article 26 of the Code) by The Judge Advocate General of the armed force of which such military judge is a member.

Judge McCall did not recuse or disqualify himself from petitioners' case. *See* Manual for Military Commission (MMC), Rule for Military Commissions (R.M.C.) 902(d)(1) (stating "[t]he military judge shall, upon motion of any party or sua sponte, decide whether the military judge is disqualified"). The CTJ, however, replaced Judge McCall on December 14, 2020, when he detailed himself as trial judge for petitioners' military commission. App. 122–23, 472. The CTJ reviewed his own detailing order after he received certifications from the service Judge Advocates General that all certified judicial nominees met RTMC qualifications. *See* App. 122. On December 15, 2020, the CTJ denied as moot petitioners' motion to abate and respondent's motion to recuse. App. 472–73.

On December 18, 2020, and January 19, 2021, Khalid Shaikh Mohammad, a co-accused of petitioners, challenged the CTJ's "unwarranted removal of a fully qualified military judge from Mr. Mohammad's case." App. 194–95. Mohammad asserted that the Deputy SECDEF had unlawfully influenced the CTJ with issuance of his November 16, 2020, memorandum response to the CTJ's request for clarification of RTMC 1-3.b concerning the existence of the CTJ's inherent authority to waive the two-year experience requirement for military commission judges. *See* App. 222, 513, 524. In his ruling and order on the issue, the CTJ observed that the Deputy SECDEF's response—that the CTJ was not a waiver authority for the RTMC—was an "undisputed statement of fact" and did not constitute unlawful influence of the commission. App. 469. The CTJ also noted that "none of the defense counsel presented any evidence that indicated the Deputy [SECDEF's] factual answer was wrong." App. 469 n.28.

Petitioners objected during their commission proceedings to the CTJ's detailing of himself to their military commission, arguing that communications within the Office of the SECDEF amounted to unlawful influence and demonstrated an apparent lack of impartiality. *See* App. 181–90. Petitioners contended any person involved in the Deputy SECDEF's interpretation of RTMC ¶¶ 1-3.b and 6-3.d should be disqualified from involvement in their military commission. App. 180, 190, 474. The military commission did not issue a ruling on petitioners' objections. Pet'rs' Br. 14. The CTJ, however, determined that the Deputy SECDEF "was not impermissibly engaging in legal interpretation . . . when he answered [the] factual question" about authority to waive requirements in the RTMC.[8] App. 469 n.27.

[8] The CTJ made this ruling on a motion filed by petitioners and their co-accused to compel production of communication about the detail and removal of Judge McCall as the military commission judge on their cases. App. 463 nn.2–3.

On January 20, 2021, Paul S. Koffsky succeeded DoD General Counsel Ney.[9] Kathleen H. Hicks was sworn in as the Deputy SECDEF on February 9, 2021, succeeding Deputy SECDEF Norquist.[10]

After December 14, 2020, when CTJ Watkins re-detailed himself to this case, he did not act as trial judge at any hearings. His decisions were limited to filing deadlines and scheduling orders for hearings, App. 568–77; denial of a further stay of the decommissioning of a black site, App. 563–67; and discovery related to Judge McCall's detail and removal, App. 463–71, 470 n.30. On April 16, 2021, the CTJ nominated Judge Lanny J. Acosta Jr. as his replacement. App. 582–83. On June 17, 2021, the Convening Authority deferred to the CTJ's nomination and designated Judge Acosta as the CTJ, effective July 1, 2021.[11] App. 578; *see* R.M.C. 503(b)(2) (describing CTJ selection process); RTMC ¶ 6-1.b (same). Chief Trial Judge Acosta detailed himself as the military judge to petitioners' case, effective July 31, 2021. AE 001N at 1.

III. LAW AND ANALYSIS

This court has jurisdiction over mandamus petitions for extraordinary relief under the All Writs Act, 28 U.S.C. § 1651(a). *See In re Al-Nashiri*, 921 F.3d 224, 227, 233 (D.C. Cir. 2019). A writ of mandamus may only be granted when a petitioner demonstrates:

> that [his] right to issuance of the writ is clear and indisputable, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires, and the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. at 233 (alterations in original) (internal quotation marks omitted) (quoting *Cheney v. U.S. District Court*, 542 U.S. 367, 380–81 (2004)).

[9] Jim Garamone, *DOD Succession Plan Remains in Effect Until Senate Confirms Biden Nominees*, Dep't of Def. News (Jan. 20, 2021), https://www.defense.gov/Explore/News/Article/Article/2477349/dod-succession-plan-remains-in-effect-until-senate-confirms-biden-nominees/.

[10] *Deputy Secretary of Defense Kathleen H. Hicks*, Dep't of Def. website, https://www.defense.gov/our-story/meet-the-team/deputy-secretary-of-defense/ (last visited Aug. 23, 2021).

[11] More than two years earlier, on October 17, 2018, the SECDEF had delegated authority to designate the CTJ to the Convening Authority in accordance with R.M.C. 503(b)(2) and RTMC ¶ 6-l.b. App. 580.

A. Judicial independence

Petitioners assert that the Deputy SECDEF engaged in unlawful influence and "infringed judicial independence by taking the legal question of regulatory interpretation—which Chief Judge Watkins considered ambiguous and some of the parties actually briefed—from the judiciary and deciding it within the chain of command." Pet'rs' Br. 3–4 (footnote omitted).

The Constitution's Framers took "the unprecedented step of establishing a 'truly distinct' judiciary" comprised of completely independent courts of justice through "life tenure for judges and protection against diminution of their compensation." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1332 (2016) (Roberts, C.J., Sotomayor, J., dissenting) (quoting The Federalist No. 78, at 466 (Alexander Hamilton)). In its analysis of statutory tenure and compensation provisions for administrative law judges, the Second Circuit explained the relationship between Article III and judicial independence, as follows:

> These statutory provisions [regarding administrative law judges] draw upon the more ancient wisdom grounded in history and contained in Article III, which safeguards federal judicial independence through still more stringent compensation and tenure provisions. *See* Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979). The independent judiciary is structurally insulated from the other branches to provide a safe haven for individual liberties in times of crisis.

Nash v. Califano, 613 F.2d 10, 15 (2d Cir. 1980). Indeed, "[t]he central pillar of judicial independence was Article III itself, which vested '[t]he judicial Power of the United States' in 'one supreme Court' and such 'inferior Courts' as might be established. The judicial power was to be the Judiciary's alone." *Bank Markazi*, 136 S. Ct. at 1332 (first alteration added) (quoting U.S. Const. art. III, § 1).

The judiciary's independence is necessary "in all ways that might affect substantive decisionmaking," *Hastings v. Jud. Conf. of U.S.*, 770 F.2d 1093, 1104 (D.C. Cir. 1985) (Edwards, J., concurring in part), because without independence, accomplishment of its defined constitutional role will be seriously impaired, *see id.* at 1105. The Framers understood this basic premise, that an independent judiciary is "a principal guarantor of our liberty." *Id.* at 1111. Judges must be independent to act, and a judge "must feel secure that such action will not lead to his own downfall."[12] An independent judiciary "was

[12] Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 690 (1979), https://digitalcommons.law.yale.edu/ylj/vol88/iss4/2.

one of the grievances that led to the Revolution."[13] "What was true [over] two centuries ago is true today: 'Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.'" *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (en banc) (per curiam) (quoting Code of Judicial Conduct Canon 1 cmt.).

In Article III courts, the focus of the inquiry into judicial independence is on concerns of "the independence of the judiciary as an institution from other branches of government."[14] Article III "cases speak almost exclusively to judicial independence from the influence or control of the legislative and executive branches." *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 64 (D.C. Cir. 2001). An official who is "approving . . . procedural regulations," "issuing ethical rules," and "overseeing various logistical aspects of . . . duties" for a judge—does not have the power "to play an influential role in the [judge's] substantive decisions." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012).

Article I courts are not part of and do not exercise Article III "judicial power." *See Freytag v. Comm'r*, 501 U.S. 868, 889 (1991). Article I courts are established by Congress, and they "exercise[] a portion of the judicial power of the United States." *Id.* at 891 (discussing powers of tax court). Congress authorized military commissions in the MCA, and like courts-martial, military commissions are "fundamentally judicial. . . . [and] they remain 'as fully a court of law and justice as is any civil tribunal.'" *Ortiz v. United States*, 138 S. Ct. 2165, 2176 n.5 (2018) (quoting W. Winthrop, Military Law and Precedents 49, 54 (2d ed. 1920) (discussing courts-martial)).

Military commissions and courts-martial are fundamentally different from Article III trials. Military trials have "a long tradition of concentrating power in the Executive Branch" and lack "constitutional or statutory tenure protections for the judiciary." *United States v. Ali*, 71 M.J. 256, 281 (C.A.A.F. 2012). They encompass "features that combine prosecutorial and judicial functions, and reflect[] the significant exercise of legislative functions by executive officials." *Id.* Judicial independence is a key component protecting the accused's right to a fair trial. Absent tenure protections in military commissions, judicial independence is protected by statutory, regulatory, and case law prohibitions against unlawful influence.

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[13] *Id.* at 700. One grievance in the Declaration of Independence against King George III was, "He has made Judges dependent on his Will alone, for tenure of their offices, and the amount and payment of their salaries." *Id.* at 691; *see also Nash v. Califano*, 613 F.2d 10, 15 n.11 (2d Cir. 1980) (stating same).

[14] Kaufman, *supra* note 12, at 713 (quoting S. Rep. No. 1035, at 8 (1978)).

B. Unlawful influence

(1) Statutory and regulatory prohibitions

The Military Commissions Act (MCA), at 10 U.S.C. § 949b(a), prohibits unlawful influence, stating:

> (1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.[15]
>
> (2) No person may attempt to coerce or, by any unauthorized means, influence—
>
> (A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;
>
> (B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or
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> (C) the exercise of professional judgment by trial counsel or defense counsel.[16]

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[15] In comparison, Article 37(a)(1), Uniform Code of Military Justice (UCMJ), states:

> No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.

10 U.S.C. § 837(a)(1) (2019). The text in this and the next footnote are cited from Lexis, which mirrors the statutory provisions "Certified by Superintendent of Documents, Government Publishing Office" to be "Authenticated U.S. Government Information." Gov. Publishing Off., https://www.govinfo.gov/content/pkg/USCODE-2019-title10/pdf/USCODE-2019-title10-subtitleA-partII-chap47.pdf. The language in the Manual for Courts-Martial (2019 ed.) is slightly different from its corresponding statute, 10 U.S.C. § 837, and combines subsections (a)(1), and (a)(3) *infra*, into a single subsection (a) under Article 37, UCMJ. *See* Manual for Courts-Martial, United States, app. 2, at A2–13 (2019 ed.).

[16] In comparison, Article 37(a)(3), UCMJ, states:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority or preliminary hearing officer with respect to such acts taken pursuant to this chapter as prescribed by the President.

Title 10, section 949b(a)(1) of the United States Code, is not applicable to the Deputy SECDEF because he did not convene a military commission under the MCA. Nor was CTJ Watkins a convening, approving, or reviewing authority, which are statutorily protected persons under 10 U.S.C. § 949b(a)(2)(B). The CTJ, however, became the "military commission" when he detailed himself as the military judge, and at that point he became statutorily protected from unlawful influence. 10 U.S.C. § 949b(a)(2)(A). Executive Branch officials, including the Deputy SECDEF, were prohibited from (i) "attempt[ing] to coerce or, [(ii)] by any unauthorized means, attempt[ing] to influence" the CTJ's acts after he became the military commission. *Id.* Regulation for Trial by Military Commission, section 1-4, adds that "persons involved in the administration of military commissions must avoid the appearance or actuality of unlawful influence."

(2) Military case law under the Uniform Code of Military Justice

The Supreme Court has emphasized: "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). Unlawful influence damages the perception of impartial justice, which is crucial to the legitimacy of military commissions. *See id.* We find the well-developed judicial construction of military justice unlawful influence cases to be "instructive" in our analysis of allegations of unlawful influence in the military commission case at bar. 10 U.S.C. § 948b(c).

Unlawful "command influence[17] is the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). Petitioners have "the initial burden of raising the issue of unlawful command influence." *United States v. Ashby*, 68 M.J. 108, 128 (C.A.A.F. 2009). In order for petitioners to meet this burden they must show "facts which, if true, constitute unlawful command influence, and that the alleged unlawful command influence has a logical connection to the [military commission] in terms of its potential to cause unfairness in the proceedings." *United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006) (quoting *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)). "The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required . . . is 'some evidence.'" *United States v. Stoneman*, 57 M.J. 35, 41 (C.A.A.F. 2002) (quoting *Biagase*, 50 M.J. at 150). "In cases involving unlawful command influence, the key to our analysis is effect—not knowledge or intent"—of the government actor. *United States v. Boyce*, 76 M.J. 242, 251 (C.A.A.F. 2017).

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10 U.S.C. § 837(a)(3) (2019).

[17] The term "unlawful influence" is broader than and encompasses "unlawful command influence." The analytical framework for both is the same.

The effect of the unlawful influence may be actual prejudice to the complainant or the appearance of it. For actual unlawful influence, we assess whether "the proceedings were unfair" and whether the "unlawful influence was the cause of the unfairness." *Biagase*, 50 M.J. at 150. For the appearance of unlawful influence, we consider whether "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 249 (citation omitted). The effects we look for from actual unlawful influence are different than the effects from the appearance of unlawful influence.

> [U]nlike actual unlawful command influence where prejudice to the accused is required, no such showing is required for a meritorious claim of an appearance of unlawful command influence. Rather, the prejudice involved in the latter instance is the damage to the public's perception of the fairness of the military justice system as a whole and not the prejudice to the individual accused.[18]

The source of unlawful influence in military proceedings is not limited to any particular government official. *See United States v. Bergdahl*, 80 M.J. 230, 234–35 (C.A.A.F. 2020) (plurality opinion) (four of five judges agreeing to threshold matter that a sitting President, and a military retiree subject to the Uniform Code of Military Justice (UCMJ), are "capable of committing unlawful command influence"); *Boyce*, 76 M.J. at 244 (reversing findings and sentence due to appearance of unlawful influence by Air Force Chief of Staff towards convening authority); *United States v. Hutchins*, No. 200800393, 2018 CCA

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[18] *United States v. Boyce*, 76 M.J. 242, 248–49 (C.A.A.F. 2017) (footnote omitted).

> A determination that an appellant was not personally prejudiced by the unlawful command influence, or that the prejudice caused by the unlawful command influence was later cured, is a significant factor that must be given considerable weight when deciding whether the unlawful command influence placed an "intolerable strain" on the public's perception of the military justice system. However, such a determination ultimately is not dispositive of the underlying issue of whether the public taint of an appearance of unlawful command influence still remains.

Id. at 248 n.5.

> We discern no tension between this standard [requiring damage to public perception, not prejudice to the individual accused] and our holding in *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999), that "the alleged unlawful command influence [must have] a logical connection to the court-martial." A conclusion that there was a "logical connection" to a court-martial is not the same thing as a conclusion that there was prejudice to the individual accused. Rather, "logical connection" is merely a germaneness requirement.

Id. at 249 n.6 (first alteration added).

LEXIS 31, at *65 & n.68 (N.M. Ct. Crim. App. Jan. 29, 2018)[19] (noting the Navy Secretary is not a convening authority or commanding officer "and is not subject to the UCMJ, thus Article 37, UCMJ, does not appear to apply to him," yet concluding Secretary was "a government actor capable of UCI [unlawful command influence]"), *aff'd*, 78 M.J. 437 (C.A.A.F. 2019). Here, when the Deputy SECDEF issued his interpretation of RTMC ¶ 6-3.d, he was acting under his delegation from the SECDEF, *see supra* note 6, and was an official who could engage in unlawful influence, *see Bergdahl*, 80 M.J. at 234–35.

We agree with petitioners that the CTJ is an official who could be unlawfully influenced in his decision to designate petitioners' trial judge. *See* Reply 3–7 (July 29, 2021) (discussing *United States v. Mabe*, 33 M.J. 200 (C.M.A. 1991)). The premise for the finding of unlawful influence in *Mabe*, however, was the expressed concerns of judicial supervisors about the leniency of the trial judge's sentences. *See Mabe*, 33 M.J. at 201–02. In petitioners' case, there is no evidence of *any* concern from any government official about any of Judge McCall's judicial decisions.

Actual unlawful influence "is an improper manipulation of the criminal justice process which negatively affects the fair handling and/or disposition of a case." *Boyce*, 76 M.J. at 247, *quoted in United States v. Barry*, 78 M.J. 70, 76–77 (C.A.A.F. 2018). Not all influence is unlawful. The word *coerce* in 10 U.S.C. § 949b(a)(2) means to "compel by force or threat" in the context of 10 U.S.C. § 837—and *threat* means "a communicated intent to inflict harm or loss on another or another's property." *Bergdahl*, 80 M.J. at 249 (Maggs, J., concurring in part and concurring in judgment) (internal quotation marks and citation omitted). Here, there is no evidence that the Deputy SECDEF coerced, or attempted to coerce, the CTJ in violation of § 949b(a)(2) because the Deputy SECDEF did not threaten the CTJ. *See Bergdahl*, 80 M.J. at 249 (Judge Maggs explaining there was no Article 37(a), UCMJ, violation, given uncontested trial finding that Senator John McCain did not threaten or "forcefully influence" convening authority's decisions and concluding that threat of hearings if Bergdahl "received no punishment" did not coerce convening authority into referring Bergdahl's case to a general court-martial). Petitioners do not assert, and we do not find, that the Deputy SECDEF's decision to issue his November memorandum was "unauthorized." *Cf. id.* at 249–51 (discussing authority of Senator McCain to hold hearings). Here, the Deputy SECDEF's interpretation of RTMC ¶ 6-3.d was an authorized action.

If petitioners meet their initial burden, "the burden shifts to the government to demonstrate beyond a reasonable doubt either that there was no unlawful command influence or that the proceedings were untainted." *Lewis*,

[19] *United States v. Hutchins*, No. 200800393, 2018 CCA LEXIS 31 (N.M. Ct. Crim. App. Jan. 29, 2018), may "not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2."

63 M.J. at 413 (citing *Stoneman*, 57 M.J. at 41). *Lewis* and *Salyer*, 72 M.J. 415 (C.A.A.F. 2013), illustrate the Court of Appeals for the Armed Forces (CAAF) analysis of attempts from Executive Branch actors to unlawfully influence the military judge.

In *Lewis*, the staff judge advocate (SJA)—who was the legal advisor to the convening authority—"through suggestion, innuendo, and [his] personal characterization of [a personal or romantic] relationship between" the military judge and civilian defense counsel, used the trial counsel to aggressively voir dire the military judge until she recused herself from the case. *Id.* at 414. One of the replacement military judges found unlawful influence and disqualified the SJA from further actions in the case. *Id.* at 411. The CAAF was "concerned that the SJA's instrument in the courtroom, the trial counsel, remained an active member of the prosecution despite participating fully in the unlawful command influence." *Id.* at 414. The CAAF found that "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Id.* at 415. The military judge's remedies were insufficient to fully remove this taint, the appearance of unlawful influence continued, and so the CAAF set aside Lewis' conviction and dismissed the charges with prejudice. *See id.* at 414–17.

In *Salyer*, the government used information from the military judge's official personnel file as a basis to voir dire him about whether his marriage to a seventeen-year-old female ten years previously "might have influenced [his] pretrial ruling on the definition of a minor," 72 M.J. at 423 (citation omitted), where the accused was charged with child pornography offenses, *id.* at 417. Trial counsel's supervisor, the Officer-in-Charge (OIC), *see id.* at 420–21, told the military judge's judicial supervisor he was "unsure about why" the military judge had defined a minor as under sixteen years of age, *id.* at 420. The OIC also relayed what he knew about the age of the military judge's wife when they married. *Id.* The military judge's judicial supervisor then told the military judge that the OIC informed him that he was "not happy" about the military judge's definition of minor. *Id.* at 421 (citation omitted); *see id.* at 425–26. The military judge recused himself because of the communication from the OIC to the military judge's supervisor, and trial counsel's voir dire into a "personal family matter." *Id.* at 421–22. The CAAF found an appearance of unlawful influence and cited the recusal of the challenged military judge and the newly-detailed military judge's reversal of a defense-favorable ruling of the challenged military judge. *Id.* at 428. "Moreover, the same persons [trial counsel and his supervisory OIC] who had accessed the military judge's official file and made ex parte contact with the first military judge's supervisor were not barred from [all] further participation in the case." *Id.* The CAAF dismissed the charges with prejudice. *Id.*

The decisions in *Lewis*, *Salyer*, *Boyce*,[20] and *Stoneman*[21] predate the 2019 amendment of Article 37(c), UCMJ, 10 U.S.C. § 837(c). The 2019 amendment added a new subsection (c) as follows: "No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused." The appellate court in these four cases did not assess for prejudice to the substantial rights of the accused, and therefore, the utility of the analyses in these four cases to petitioners' case may be limited.

The alleged unlawful influence in petitioners' case occurred after December 20, 2019, the effective date of the 2019 amendments to Article 37, UCMJ.[22] More importantly, 10 U.S.C. § 950a(a) states, "[a] finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." We also must include in our assessment the impact on the accused of the existence of unlawful influence.

(3) Conclusions on unlawful influence

Looking at the facts presented by both petitioners and respondent, we do not see "some evidence" that petitioners' proceedings were impacted by unlawful influence. *See Stoneman*, 57 M.J. at 41 (quoting *Biagase*, 50 M.J. at 150). Moreover, the Deputy SECDEF's actions were not prejudicial to "the substantial rights of the" petitioners. *See* 10 U.S.C. § 950a(a). Deputy SECDEF Norquist's decision on November 16, 2020, not to amend RTMC ¶ 6-3.d and not to give CTJ Watkins authority to waive the two-year experience requirement did not send a coercive signal to the CTJ.

The CTJ possessed independent authority within the parameters set forth in the MCA, MMC, and RTMC about who to designate as petitioners' trial judge, how to rule on pending motions before the military commission, and who to nominate as his replacement. Petitioners' contention that the CTJ's decisions

[20] In *Boyce*, 76 M.J. at 251–53, the unlawful influence involved a convening authority who set aside a court-martial conviction that had garnered heightened political interest. The Air Force Chief of Staff advised the convening authority that the Secretary of the Air Force said he must "voluntarily retire from the Air Force at the lower grade of major general, or wait for the Secretary to remove him from his command in the immediate future." *Id*. at 252.

[21] In *United States v. Stoneman*, 57 M.J. 35, 37 (C.A.A.F. 2002), the unlawful influence involved a brigade commander's statement about the severe consequences for certain misconduct.

[22] Subsection (c) of the Act of Dec. 20, 2019, provides: "The amendments made by subsections (a) and (b) [amending Article 37, UCMJ] shall take effect on the date of the enactment of this Act and shall apply with respect to violations of section 837 of title 10, United States Code (article 37 of the [UCMJ]), committed on or after such date." Pub. L. No. 116–92, § 532(b), 133 Stat. 1198, 1361.

after December 14, 2020, when he detailed himself as trial judge for petitioners' military commission, were made "while his independence and impartiality [were] compromised," Pet'rs' Br. 33, is nothing more than "mere allegation or speculation," *Stoneman*, 57 M.J. at 41.

After the November 20, 2020, Presidential election, Deputy SECDEF Norquist and DoD General Counsel Ney became, at least to some extent, "lame ducks."[23] Mr. Ney was succeeded on January 20, 2021, and Deputy SECDEF Norquist was succeeded on February 9, 2021. *See supra* notes 9–10. The CTJ's decisions between December 14, 2020, and February 9, 2021, were limited to: filing deadlines and hearing schedules, App. 568–77; denial of a request for continued preservation of a black site, App. 563–67; denial in part of discovery related to the detail and removal of Judge McCall, App. 463–71, 470 n.30; and nomination of his replacement, App. 582–83. *See also* Pet'rs' Br. 16, 33. The CTJ's most important decision, nomination of Judge Lanny J. Acosta Jr. to replace him as CTJ, was made after Mr. Ney and Deputy SECDEF Norquist had left their DoD positions.

We see no possibility that the actions of the Deputy SECDEF and General Counsel Ney had any effect on the CTJ's decisions. We are satisfied beyond a reasonable doubt that the actions of the Deputy SECDEF "did not place an intolerable strain upon the public's perception of the military [commission] system," and would not cause "an objective, disinterested observer, fully informed of all the facts and circumstances, . . . [to] harbor a significant doubt about the fairness of [petitioners' military commission] proceeding." *Boyce*, 76 M.J. at 249–50 (internal quotation marks and citation omitted).

The Deputy SECDEF's November memorandum did not give him any "influence or control" over the CTJ's judicial decisions and did not create an appearance of bias. *Mohammad*, 391 F. Supp. 3d at 1072. In *Mohammad*, Petitioner Ali challenged the independence of the entire CMCR because one CMCR judge, who was sitting on Petitioner Ali's panel, voluntarily sought ethics advice from the DoD Standards of Conduct Office (SOCO). *Id.* at 1068–69. The CMCR denied the challenge, concluding that asking SOCO for ethical advice did not give DoD "any influence or control over any CMCR judge's judicial decisions, or create[] an appearance of bias." *Id.* at 1074 (citing *Intercollegiate Broad.*, 684 F.3d at 1338). As in *Mohammad*, the CTJ's request

[23] A "lame duck" is an official with "little real power, for example, because their period of office is coming to an end." *Lame Duck*, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/lame-duck (last visited Aug. 20, 2021); Black's Law Dictionary (9th ed. 2009) ("An official serving out a term after a successor has been elected."); *see, e.g.*, *Harper & Row, Publ'rs, Inc. v. Nation Enters.*, 471 U.S. 539, 577 (1985) (describing advice to President Gerald Ford about how he could become a "lame-duck President" and lose significant influence in foreign affairs and with Congress if he announced he was not running for re-election).

to the SECDEF for clarification of his inherent waiver authority under RTMC ¶ 1-3.b also did not create an appearance of bias.

C. Detailing Judge McCall as petitioner's military commission judge

Chief Trial Judge Watkins exceeded his authority in RTMC ¶ 1-3.b and violated RTMC ¶ 6-3.d when he detailed Judge McCall to petitioners' military commission. This detail was void ab initio because Judge McCall did not meet the two years of experience qualification requirement in RTMC ¶ 6-3.d for military commission judges.

D. Regulation for Trial by Military Commission (RTMC) waiver authority and RTMC interpretation

We now turn to the question of whether the Deputy SECDEF had authority to waive the provisions of RTMC ¶ 6-3.d, or to delegate to the CTJ the authority to waive the qualification requirement of two years of judicial experience.

The SECDEF has authority to "prescribe regulations providing for the manner in which military judges are [] detailed to military commissions." 10 U.S.C. § 948j(a). The MCA does not grant the SECDEF authority to waive portions of the regulations he prescribes. *Cf., e.g.*, 42 U.S.C. § 3535q (specifying process for waivers of provisions in Housing and Urban Development regulations). In 2011, the SECDEF promulgated the current version of the RTMC. Paragraph 6-2 of the 2011 Regulation for Trial by Military Commission makes the CTJ responsible for detailing military judges for military commission trials, and there is no mention of waiver authority.

Eligibility requirements for military commission judges include being a "commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under [10 U.S.C. § 826] . . . as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member." 10 U.S.C. § 948j(b) (brackets in original); *see* R.M.C. 502(c)(1) (stating similar). Regulation for Trial by Military Commission, paragraph 6-3.d, adds the requirement at issue here—that is, "[m]ilitary judges must have at least two years of experience as a military judge while certified to be qualified for duty as a military judge in general courts-martial. *See* R.M.C. 503(b)."

The Deputy SECDEF concluded in his memorandum that RTMC ¶ 6-3.d was binding on the military commission and prohibited detailing of military commission judges with less than two years of judicial experience. *See* App. 164. This interpretation does not violate the Constitution or a federal statute. Therefore, his interpretation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. United*

States, 508 U.S. 36, 45 (1993) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The CTJ may independently interpret RTMC ¶ 6-3.d.

> [F]or "matters within the normal purview of military courts, all military judges are competent to interpret them and do not afford any deference to an agency interpretation. For matters within the normal purview of military courts, it is interpretation by appellate courts, not agency representatives, to which military judges must defer."

United States v. Al-Nashiri, 374 F. Supp. 3d 1190, 1214 (CMCR 2018) (per curiam) (quoting *United States v. Johnson*, 76 M.J. 673, 683 (A.F. Ct. Crim. App. 2017)), *vacated on other grounds*, *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). Even though the source of the agency interpretation in this case was the Deputy SECDEF, under a proper delegation from the SECDEF, the Deputy's interpretation is not binding on the CTJ or on this court. *See id.*

Assuming the CTJ believed Judge McCall was the best available candidate to be petitioners' military judge, he should have requested authority to detail Judge McCall before doing so. This would have entailed asking the SECDEF to change the RTMC to permit the CTJ to waive the experience requirement in RTMC ¶ 6-3.d. *See generally Deese v. Esper*, 483 F. Supp. 3d 290, 310 (D. Md. 2020) (discussing how to determine correct waiver authority for commissioning of cadets with medical issues). The CTJ erred when he detailed Judge McCall and then requested that the SECDEF clarify whether RTMC 1-3.b included the inherent authority of the CTJ to waive the two-year judicial requirement for military commission judges. This resulted in an unqualified military commission judge taking actions in petitioners' military commission.

Regulation for Trial by Military Commission, paragraph 6-3.d, limits the pool of judges who may sit on petitioners' case, which limitation is binding on the SECDEF, Deputy SECDEF, and the CTJ. *See U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 253–54 (D.C. Cir. 2005) (stating International Trade Commission "is bound by its regulations" (citing *e.g.*, *United States ex rel. Accardi v Shaughnessy*, 347 U.S. 260, 267 (1954); *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005))).[24] The RTMC does not specify a process or authority

[24] Treatment of agency regulations on employment is helpful to our analysis. In employment matters, where the only due process rights are those created by the agency's own regulations, the courts "have long required agencies to abide by internal, procedural regulations . . . even when those regulations provide more protection than the Constitution or relevant civil service laws." *Doe v. U.S. Dep't of Just.*, 753 F.2d 1092, 1098 (D.C. Cir. 1985). "[S]crupulous compliance with [the agency's] regulations is required to avoid any injuries." *Lopez v. FAA*, 318 F.3d 242, 246 (D.C. Cir. 2003) (quoting *Mazaleski v. Treusdell*, 562 F.2d 701, 719 (D.C. Cir. 1977)). This law applies equally to our analysis of the RTMC.

for waiver of its requirements, and the Deputy SECDEF and CTJ do not have this waiver authority.[25]

The Deputy SECDEF could "amend[], revise[], or revoke[]" RTMC ¶ 6-3.d. *United States v. Wheeler*, 27 C.M.R. 981, 994 (A.F.B.R. 1959). Changes to the RTMC can be promulgated without complying with the notice and comment requirements in the Administrative Procedure Act because military commission procedures fall within the military affairs exception in 5 U.S.C. § 553(a)(1). *See United States v. Mingo*, 964 F.3d 134, 140 (2d Cir. 2020).

> The absence of a notice-and-comment obligation makes the process of issuing [non-legislative] interpretive rules comparatively easier for agencies than issuing legislative rules. But that convenience comes at a price: [such] rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (discussing non-legislative interpretative rules)).

In response to the CTJ's request for clarification of waiver authority, the Deputy SECDEF had authority to (i) find the two-year qualification requirement unnecessary and amend the RTMC to eliminate it, or (ii) change the RTMC to authorize himself or the CTJ to act on waivers. The Deputy SECDEF also had authority to choose *not to change* the RTMC.

In this instance, we agree with the Deputy SECDEF's view that minimal experience qualification requirements for military commission judges are reasonable in light of the complexity of military commission cases.[26] The

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[25] Petitioners and respondent objected to Judge McCall's disqualifying lack of experience under RTMC ¶ 6-3.d. App. 136, 169. Rule for Military Commissions 902(e) does not authorize waiver of the two-year experience required. Rule for Military Commissions 902(e) states:

> No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in section (b) of this rule [which includes R.M.C. 502(c) disqualification for lack of military and bar requirements]. Where the ground for disqualification arises only under section (a) of this rule [when judicial impartiality might reasonably be questioned], waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

We take no position on whether the parties could waive the two-year experience requirement.

[26] In 2021, Article 66, UCMJ, 10 U.S.C. § 866, was amended to add subsection (a)(2) requiring "not fewer than 12 years of experience in the practice of law before" assignment to a Service court of criminal appeals. Act of Jan. 1, 2021, Pub. L. No. 116-283, § 542(a)(2), 134 Stat. 3388, 3611.

Deputy SECDEF explained in his November memorandum that the experience requirement was "a reasonable and necessary requirement to best protect the interests of the accused and the Government in administering military commissions." App. 164. This is particularly true in petitioners' case, as it is exceptionally complex. As of August 2, 2021, the transcript was 31,799 pages; there were 9,421 exhibits; and the page total for exhibits was 393,205. Email from Donna L. Wilkins, Chief, Off. of Ct. Admin., Off. of Mil. Comm., to Mark Harvey, Clerk, CMCR (Aug. 2, 2021). There are more than ninety non-ex parte discovery and law motions currently pending before the commission. Resp't Br. 8.

Petitioners have failed to show that the Deputy SECDEF's interest in compliance with the judicial qualifications requirements in RTMC ¶ 6-3.d was "anything other than proper, official, and lawfully directed" at ensuring a qualified, experienced trial judge for petitioners' military commission trial. *Ashby*, 68 M.J. at 129.

E. Recommending statutory, regulatory, and procedural changes to Executive Branch officials

In the military justice system, trial judges for courts-martial may send suggested Manual for Courts-Martial (MCM) and UCMJ changes to the DoD Joint Service Committee on Military Justice. *See* MCM, United States, pt. 1, ¶ 4 (2019 ed.). Military commissions do not have a formally established section or entity to receive, study, and process recommended changes to the MCA, MMC, and the RTMC.

The Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has twice recommended changes to military commission procedures to improve efficiency and resolve thorny legal issues. The D.C. Circuit said *In re Khadr*,

> [T]his is a serious issue — one that Congress and the Department of Defense would be wise to address and resolve promptly, either by expressly barring the civilian judges on the U.S. Court of Military Commission Review from the private practice of law or by making crystal clear that the civilian judges on the Court may serve as special government employees and continue their part-time private practice of law.

823 F.3d 92, 100 (D.C. Cir. 2016). The D.C. Circuit said in *In re Al-Nashiri*, 791 F.3d 71, 86 (D.C. Cir. 2015), "[T]he President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR's military judges. . . . by re-nominating and re-confirming the military judges to be *CMCR judges*." In both instances, DoD, the President, and Congress, implemented these recommendations and resolved the stated legal issues without waiting for the issue to ripen and then be reviewed by the appellate courts.

Similarly, this court has recommended changes to military commission rules and regulations. In 2016, the CMCR Acting Chief Judge recommended clarification of the CMCR standard of review, "[t]he appointment process, status and tenure of all [CMCR] judges, en banc procedures," and changing the name of the court to the Court of Military Commission Appeals. In 2018, we requested amendments to (i) R.M.C. 505(d)(2)(B) and 506(c) to "mak[e] them consistent with the corresponding Rules for Courts-Martial" and (ii) R.M.C. 505 so it "specif[ies] that under this rule 'detailed counsel' includes all counsel representing the accused, including 'learned counsel.'" *Nashiri*, 374 F. Supp. 3d at 1225 n.26.

In 2020, the CMCR Chief Judge recommended changes to 10 U.S.C. § 950f to incorporate recent Article 66, UCMJ, amendments concerning the authority of and limits on Service courts of criminal appeals, and changes to address "status, pay, tenure, and removal" of civilian CMCR judges, appointment of military CMCR judges, en banc procedures, the CMCR name, and the source for ethics advice. She also suggested a change to the MMC relating to disqualification of CMCR judges to make our rules more consistent with rules for Article III courts. On February 16, 2021, the CMCR Chief Judge recommended changes to RTMC Chapter 25, to clarify the provisions on judicial nominations and appointments. The SECDEF made some of the proposed changes, did not make others, and is still considering some. We do not see how rejection of some of the CMCR proposals and delays in approval of others show the CMCR is not independent or that officials in the Executive or Legislative Branches are engaging in unlawful influence over the CMCR.

F. Rotating military judges

In December 2020, co-accused Mohammad raised concerns about the number of military commission judges who have been detailed to his case, and petitioners brought this issue to our attention in their appendix. App. 222–23. Co-accused Mohammad noted that his commission has had nine trial judges from the inception of his trial in 2008 through December 18, 2020, including the following six judges who presided over his trial in the previous 36 months:[27] (1) Judge Parrella (September 3, 2018, to May 31, 2019); (2) Judge W. Shane Cohen (June 3, 2019, to April 24, 2020);[28] (3) CTJ Watkins (April 28, 2020, to September 17, 2020); (4) Judge Stephen Keane (September 17, 2020, to October 2, 2020); (5) Judge McCall (October 16, 2020, to December 14, 2020), and

[27] Co-accused Khalid Shaik Mohammad labeled the lack of continuity of military commission judges as "a revolving door which evidences procedural irregularity inconsistent with regular order, due process, and the requirement for a regularly constituted court." App. 222–23.

[28] During his first appearance on the record, Judge W. Shane Cohen expressed his desire to remain on the case long enough to provide continuity. App. 137–38. He acknowledged, however, that military assignment policies might not permit him to do so. *Id.*

(6) CTJ Watkins (starting on December 14, 2020).[29] App. 222 & n.116. Lack of continuity in military commission judges causes delays as the new judge learns about issues, risks inconsistent rulings, creates turmoil, and is damaging to the appearance of justice.

The Judge Advocates General of the Army, Navy, Air Force, and Coast Guard (and the Commandant of the Marine Corps for Marine judge advocates) are responsible for assigning judge advocates as judges for military commissions. 10 U.S.C. § 806(a). Assignment officials need to ensure that their nominations for military commission judges are of the highest quality, and that nominees are ready, willing, and able to serve as a military commission judge for a significant period of time. This includes asking nominees about their retirement intentions before assigning them to serve as a military commission judge. Military commission judges need to be assigned to military commissions for a sufficient period to complete trials.

We are mindful that some military commission trials have been in litigation for several years, and this unusual circumstance may necessitate an increase in the length of a military assignment until a commission trial is completed. A change to the MCA establishing tenure for military judges detailed to a military commission trial would protect military judges from orders directing their permanent change of station to a new duty assignment—and premature departure from the military commission case to which they are assigned. Establishing tenure for military commission trial judges will enhance judicial independence, ensure continuity of litigation during a military commission trial, and promote justice.

We suggest amendment of the Military Commissions Act to require that the SECDEF be the reassignment approval authority for any military commission judge detailed to a military commission trial.[30] *See generally* 10 U.S.C. § 949b(b)(4) (governing reassignment of CMCR military judges). This will enable the SECDEF to ensure that the accused will have continuity in the military judge assigned to his case.

[29] Judge Douglas K. Watkins retired from the U.S. Army, effective July 31, 2021. AE 001N at 3. Chief Trial Judge Lanny J. Acosta Jr. detailed himself as the military judge to petitioners' case, effective July 31, 2021, "for the duration necessary to expeditiously detail a different military judge." *Id.* at 1.

[30] Amendment of 10 U.S.C. § 806(a), concerning who may make recommendations for duty assignments of Army, Navy, Air Force, Marine Corps, and Coast Guard judge advocates, should also be made.

IV. CONCLUSION

Reviewing all of the grounds for intervention proffered by petitioners, we conclude that it is neither clear nor indisputable that the Deputy SECDEF's November 16, 2020, memorandum had any improper effect on petitioners' military commission. *See In re Hawsawi*, 955 F.3d 152, 156–57 (D.C. Cir. 2020); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 962 (5th Cir. 1980) (holding that mandamus "will not issue to correct a duty that is to any degree debatable" (quoting *United States v. Denson*, 603 F.2d 1143, 1147 n.2 (5th Cir. 1980))). The circumstances of the Deputy SECDEF's action in this case do not constitute a reasonable basis for the extraordinary remedy of mandamus.

Therefore, it is hereby

ORDERED that the motion to admit respondent's appendix is **GRANTED,** and petitioners' appendix and supplemental appendix are **ADMITTED**; it is

FURTHER ORDERED that the motion to invalidate Deputy SECDEF David L. Norquist's November 16, 2020, memorandum concerning CTJ Douglas K. Watkins' waiver authority is **DENIED**; it is

FURTHER ORDERED that the motion to vacate the orders of CTJ Watkins after he re-detailed himself to petitioners' case on December 14, 2020, is **DENIED**; it is

FURTHER ORDERED that the motion to disqualify any person or persons involved in the staffing of Deputy SECDEF Norquist's November 16, 2020, memorandum is **DENIED**; it is

FURTHER ORDERED that the motion to have a chief trial judge, not nominated by CTJ Watkins, is **DENIED**; and it is

FURTHER ORDERED that the decisions of Judge Matthew N. McCall based on CTJ Watkins' detailing decision are **VACATED**.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review